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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

15 Cr. 0386 (JGK)

5 CORY HARRIS, et al.,

6 Defendants.

7 -----x

8
9 March 7, 2017
10:18 a.m.

10 Before:

11 HON. JOHN G. KOELTL,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 BY: ANDREW C. ADAMS

MARGARET S. GRAHAM

Assistant United States Attorneys

18 BOBBI C. STERNHEIM

19 GRAINNE O'NEILL

Attorneys for Defendant

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1 THE CLERK: United States of America versus Corey
2 Harris.

3 Will all parties please state who they are for the
4 record.

5 MR. ADAMS: Good morning, your Honor. Andrew Adams
6 and Margaret Graham for the government.

7 MS. STERNHEIM: Good morning, your Honor. Bobby C.
8 Sternheim and Grainne O'Neill for Corey Harris, who is present
9 at counsel table.

10 MS. O'NEILL: Good morning.

11 THE COURT: Good morning.

12 I note that Mr. Harris is present.

13 A couple of -- several matters at the outset. First,
14 I saw Ms. Sternheim in the cafeteria this morning. We
15 exchanged good mornings. Nothing about that affects anything
16 that I do in the case.

17 MS. STERNHEIM: Your Honor, I disclosed that to the
18 government. And I apologize, I realize that I should treat you
19 as a juror as well, and I will note that during the pendency of
20 this matter.

21 THE COURT: Thank you. It's why I try not to go into
22 the lunchroom while I have a case on, but, as I say, nothing
23 about that affects anything that I do in the case.

24 MS. STERNHEIM: Your Honor, I don't want to in any way
25 deprive you of your coffee. I'm just kidding. I will make

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1 sure --

2 THE COURT: No. Please. I don't do it not only in
3 order to avoid seeing defense counsel but also to avoid seeing
4 government counsel. So I treat my interactions with the
5 parties in the same way that, as you mentioned, I ask the
6 parties to treat interactions with the jurors. And so I simply
7 try to avoid the situations where that might occur, and when it
8 occurs, I just bring it to the attention of the parties. So,
9 not a problem.

10 Second, the government made a submission to me
11 yesterday, which I returned and said, through my deputy, that
12 any submission which is ex parte has to include an explanation
13 why it's ex parte. And so it was resubmitted, and I signed an
14 order, which is now ex parte, under seal, and is either filed
15 under seal or shortly will be. But I also, through my deputy,
16 said to the government that any ex parte submission, there
17 should be a notice that the government has made an ex parte
18 submission so that it is in the file that the government made
19 an ex parte submission, and I haven't seen the notice that an
20 ex parte submission was made.

21 MR. ADAMS: Your Honor, I apologize. I understood the
22 order to be to alert Ms. Sternheim, which I did. But I'm happy
23 to send a confirmatory letter to the Court that I did make that
24 indication.

25 THE COURT: OK. The reason for that is there should

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1 be a notice in the file. OK.

2 There was a notice from defense counsel that the
3 defense counsel wanted to make a correction in a defense
4 submission?

5 MS. STERNHEIM: Yes, your Honor. I know the Court
6 prefers faxes, but I discovered this in transit and just wanted
7 to alert the Court and the government that there were a couple
8 of typos, let's say, in our submission which I recited in the
9 email. In our haste to get it to the government and to file
10 it, it wasn't caught, and I just wanted to raise that.

11 If the Court wishes me to go through --

12 THE COURT: Oh, I see. OK.

13 MS. STERNHEIM: It should guide you paragraph by line.

14 (Pause)

15 THE COURT: OK. No, I see the changes.

16 MS. STERNHEIM: Thank you.

17 THE COURT: OK. As a preliminary note, I mean, it
18 seems clear to me that I'm not going to be able to resolve all
19 of these issues today, and it would be wise to have a final
20 pretrial conference on the Friday before trial, and you may
21 have a better sense of the 3500 material also by that time.

22 MR. ADAMS: Yes. Your Honor, just for the Court's
23 information, we have met with defense counsel after our
24 conference yesterday and had a discussion about 3500 material
25 and the timing of production.

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1 With respect to cooperating witnesses, in fact, with
2 respect to all of the 3500 we have today, what we intend to do
3 is provide it to defense counsel this Friday. With respect to
4 cooperating witnesses and civilian, non-law enforcement
5 witnesses, we have an understanding and an agreement with
6 defense counsel -- and they can confirm this for me -- that
7 until the 17th, that is, the Friday before the trial begins,
8 that material will be maintained on an attorneys'-eyes-only
9 basis, and on the 17th the material will be fully available to
10 Mr. Haris as well. But in order to give defense counsel
11 sufficient time to prepare any further supplements to the
12 motions in limine for that final pretrial conference and to
13 conduct their own investigation, we will be producing on
14 Friday -- this Friday.

15 THE COURT: OK.

16 MS. STERNHEIM: Your Honor, that is accurate.

17 I just wanted to request that when the Court sets the
18 time for the hearing on March 17th, I'm not sure of the time of
19 it but I have been invited to in a citizenship induction in the
20 building that morning of a very special young man and I would
21 like to be able to attend that.

22 THE COURT: Sure. It is usually around 11 o'clock
23 and --

24 THE CLERK: Friday the 17th at 2:30?

25 THE COURT: Do you prefer it -- how about 2:30?

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1 MS. STERNHEIM: That would be fine, if convenient.
2 Thank you very much.

3 THE COURT: OK. So final final pretrial conference
4 March 17 at 2:30 p.m. OK.

5 So, I now have the defense response to the
6 government's motion in limine and the government response to
7 the defense motion.

8 Taking first the government motion, there is agreement
9 that the procedure to be followed with respect to alleged
10 co-conspirator statements would be if there is an objection to
11 a statement and the government seeks to admit the statement for
12 its truth as a co-conspirator statement, I would take it
13 subject to connection and instruct the jury that what it means
14 to be taken subject to connection is that the jury can consider
15 the statement for its truth unless at some point I told the
16 jury that they are not to consider it, that they are to strike
17 it from their consideration. And at the conclusion of the
18 government's evidence I would make the determination whether
19 the government has shown by a preponderance of the evidence
20 that those statements were made during and in furtherance of a
21 conspiracy by a co-conspirator of a conspiracy of which the
22 defendant was a member.

23 It should be obvious that if there are -- and you all
24 know this, but if there are out-of-court statements, the
25 statements might be offered not for the truth, in which case if

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1 in fact that's true that they are not being offered for the
2 truth, the issue of co-conspirator statements doesn't even
3 arise. So if during the trial there are objections and it's
4 the government examining and the government says not for the
5 truth and if in fact it's not for the truth, I would instruct
6 the jury that they are to consider the statement but not for
7 its truth. And I would give the jury an instruction about what
8 that means and what hearsay means and tell them that, of
9 course, I decide all evidentiary issues and they don't have to
10 be concerned about evidentiary issues, but at least the
11 distinction of whether a statement is being offered for the
12 truth of the statement, or not for its truth, is something that
13 at least they should understand. So if the government says not
14 for its truth and if indeed it's not for its truth, for
15 example, its effect on the defendant if the statement was made
16 in the defendant's presence, and if there were an objection and
17 the government says not for the truth and indeed it's not for
18 the truth, I would simply advise the jury that the statement is
19 not being offered for its truth.

20 If the government says, no, we are offering it for the
21 truth but under an exception, the government doesn't have to
22 spell out and shouldn't spell out the reason for the exception.
23 If it's sufficiently clear that it's being offered as a
24 co-conspirator statement, then the government can either say
25 "Subject to connection" or "Yes, we are offering it for the

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1 truth," and if it's apparent that it is an alleged
2 co-conspirator statement, then I will tell the jury that it is
3 being offered subject to connection.

4 MS. STERNHEIM: Your Honor, may I just respond to --

5 THE COURT: Sure.

6 MS. STERNHEIM: -- one thing that the Court said with
7 regard to the procedure to be followed?

8 THE COURT: Sure.

9 MS. STERNHEIM: One thing that you said that concerns
10 me in instructing the jury at the close of the government's
11 case, quote --

12 THE COURT: No. I didn't say that I would instruct
13 the jury at the close of the government's case. I said I would
14 have to make a finding --

15 MS. STERNHEIM: Oh, I apologize, then.

16 THE COURT: No. No. No. The jury would not be
17 informed than any finding was made.

18 MS. STERNHEIM: Thank you. I misheard.

19 THE COURT: The finding that the Court makes is out of
20 the presence of the jury. The only thing that the jury is told
21 is that a statement is being taken subject to connection, which
22 means that the jury may consider the statement for its truth
23 unless at some point in the trial I tell the jury not to
24 consider the statement, strike it from the jury's attention.
25 And if eventually I find that the statement is a co-conspirator

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1 statement, the jury is never advised of that; they just -- they
2 are never told that they cannot consider it, that they have to
3 strike it from their consideration.

4 MS. STERNHEIM: Thank you.

5 THE COURT: No. I would never tell the jury that I've
6 made that finding.

7 MS. STERNHEIM: I just misheard it, Judge.

8 THE COURT: OK. We then turn to the Nicholson
9 statement.

10 The defendant raises several issues with respect to
11 the Nicholson statement that require a government response, and
12 now you have a little time to give me a response. The first
13 issue is the alleged spousal privilege, which raises two
14 questions. One is is it right that the statements by Nicholson
15 were to a spouse, and, if so, can they be admitted despite the
16 fact that they were made at a time that they were subject to a
17 spousal privilege?

18 MR. ADAMS: Your Honor, I'm happy to respond to both
19 now.

20 THE COURT: Let me just -- I might as well finish.

21 MR. ADAMS: Sure. Sorry, your Honor.

22 THE COURT: The other question that arises then is
23 also if in fact they're made to a spouse and may be subject to
24 the spousal privilege, the question is whether Nicholson, as
25 the declarant, could reasonably believe that such statements

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1 subjected him to possible penal consequences so that the
2 statement is a statement against penal interest. If in fact
3 there is a reasonable argument that the statement could never
4 be used against him, could it reasonably be a statement against
5 penal interest?

6 In effect, those are the two issues that arise under
7 the spousal privilege issue.

8 The second set of issues is the defendant fairly says
9 that the statements have to be carefully parsed to determine
10 which are the statements against penal interest and which
11 statements go beyond statements against penal interest, and so
12 the government in its response should be precise as to what the
13 statements are so that I can make a determination of which
14 statements by Nicholson, if they are admitted as statements
15 against penal interest, are in fact against penal interest and
16 which are not in which -- so the government may also want to
17 brief the question how integral to the statement is the
18 context. So, could you parse a statement so fine as the
19 defendant would have me do so you could have a statement that
20 Nicholson stole guns and marijuana without saying that, here's
21 the context, he stole guns and marijuana from Harris? There
22 doesn't seem to be an issue with respect to smoke marijuana or
23 sold firearms, but there is an issue at least with respect to
24 the circumstances under which he stole guns and marijuana.

25 The third issue, as I see it on the Nicholson

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1 statement, is the defense says it's important that the indicia
2 of reliability go to the declarant, the out-of-court declarant,
3 Nicholson, and not to the person reporting Nicholson's
4 statements. The jury can assess that credibility. But it
5 would appear that the government's original submission did go
6 to what are the indicia of reliability for the statement,
7 because the government says it has other people who are going
8 to testify that what Nicholson said was in fact truthful; there
9 will be other evidence in the case to support the reliability
10 of the statements by Nicholson.

11 So that at least is a third issue which the defense
12 raises.

13 OK. Mr. Adams, what would you like to tell me?

14 MR. ADAMS: Your Honor, of course we'll take the
15 opportunity to brief it more thoroughly and give the precise
16 statements.

17 What I anticipate the core of our argument with
18 respect to the questions that you've raised to be is, first,
19 that the Second Circuit has pretty squarely ruled that the
20 marital privilege does not act as a bar on penal interest. And
21 I can give you two citations now --

22 THE COURT: Yes, by all means.

23 MR. ADAMS: The first, the more recent one, is U.S. v.
24 Persico. It's 645 --

25 THE COURT: Hold on. I would have done this myself

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1 but your submission came in pretty late. 645?

2 MR. ADAMS: It did. I'm sorry, your Honor.

3 645 F.3d 85.

4 THE COURT: I should say, Ms. Sternheim's submission
5 came in pretty late. 645 F.3d?

6 MR. ADAMS: 85.

7 THE COURT: OK.

8 MR. ADAMS: In fairness, both of our submissions came
9 in pretty late, your Honor.

10 THE COURT: True. But I haven't gotten to yours yet.

11 MR. ADAMS: And I'm just looking for the -- I believe
12 the pincite is 102.

13 THE COURT: OK.

14 MR. ADAMS: And this is a case that involved a proffer
15 of a statement against penal interest. It involved a statement
16 by one spouse to the other. The Second Circuit said, "Nor does
17 the fact that the statement was made to the declarant itself
18 provide the basis for ruling that it is not within this hearsay
19 exception," and the statement was properly admitted.

20 It cites to a second -- another Second Circuit case,
21 the pronunciation of which I'm likely to butcher, but it's
22 United States v. Katsougrakis, K-a-t-s-o-u-g-r-a-k-i-s. That's
23 715 F.2d 769. And, again, this case deals with a statement
24 that it was both against penal interest and a co-conspirator
25 statement, but the Second Circuit affirmed its admission under

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1 either exception. The pincite I believe is 777 in that case.

2 THE COURT: OK.

3 MR. ADAMS: And it stands for essentially the same
4 proposition. And I think that the reason for that is the rule
5 doesn't require that the statement be immediately admissible in
6 court irrespective of any potential claim of privilege, but
7 that the statement tends to incriminate or be against
8 somebody's penal interest. In the event that, for example, the
9 statement -- the way the privilege was waived, for example, or
10 if the spouse had provided the statement irrespective of an
11 interest or the privilege to law enforcement, that statement
12 would tend to incriminate the person whether or not the
13 statement itself is subject to the privilege. I think the
14 Second Circuit grapples with that to some extent in both of
15 those cases.

16 With respect to --

17 THE COURT: And is it true that the spousal privilege
18 in and of itself doesn't prevent the spouse from testifying to
19 the statement?

20 MR. ADAMS: So setting aside the -- just so that we're
21 talking about the same privilege, not speaking about the
22 spousal testimonial privilege but the marital privilege for
23 confidential communications among spouses, the privilege may
24 well have been something that Mr. Nicholson could have invoked.
25 Irrespective of that, the Second Circuit has squarely said that

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1 that context plays no role in the hearsay analysis with respect
2 to penal interest.

3 THE COURT: OK.

4 MR. ADAMS: Again, we'll parse out the precise
5 statements. What I expect them to consist of will be a
6 statement that he, as you said, stole guns and marijuana from
7 Mr. Haris. I'd say the context of that is integral in a number
8 of ways. One of them is it's against his penal interest to
9 steal guns. It's against his penal interest to steal
10 marijuana. It's against his pecuniary and proprietary interest
11 to steal those things from Mr. Haris, that is, to take them
12 from another person, another specific person. And, moreover,
13 just the fact that he is taking what are clearly illegal
14 firearms, in the context of Mr. Haris' role as a narcotics
15 dealer, only heightens his own penal exposure, I would think.

16 THE COURT: No, but the issue would be -- it is
17 against penal interest to steal guns and marijuana. The
18 question would be whether the addition of stealing them from
19 Harris is also against penal interest or whether that could be
20 severed.

21 MR. ADAMS: I don't believe it can realistically be
22 severed. The context here is integral in a couple of respects.
23 One is just by itself, the person from whom I stole
24 something -- or the person from whom I took this thing, if you
25 don't know who Mr. Haris is or why he was in possession of

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1 those things, you might not understand that taking the thing
2 from Mr. Haris was in itself more than likely an illegal act.
3 If you just take Mr. Haris' bag of apples, then you have no
4 idea of whether or not that is an illegal thing. But by
5 specifying it's from this guy, Mr. Harris, given who Mr. Haris
6 is --

7 THE COURT: No, but it's not "took apples," it's stole
8 guns and marijuana.

9 MR. ADAMS: Yes, sir. But now in trying to parse it
10 out, I think now you're just looking at the phrase "from
11 Harris." I did X with respect to Harris. What Mr. Haris --
12 who Mr. Haris is informs -- not only corroborates the fact that
13 he would have had to steal the items in order to take them,
14 which is another element of the 804 analysis, but also further
15 informs why it would be against his pecuniary and proprietary
16 and penal interest to take these things from this particular
17 man.

18 THE COURT: OK. But that's pecuniary interest, not
19 penal interest, right? If you steal guns and marijuana from
20 anyone, it's against your penal interest.

21 MR. ADAMS: That's correct. If you steal guns that
22 are themselves illegally obtained, taken across state lines,
23 there is a further penal interest that I would think you would
24 be worrying about at that point.

25 THE COURT: There must be cases with respect to

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1 whether statements have to be parsed that way. I mean, we're
2 talking here about statements that were made in the past by a
3 person now deceased, and if a witness would fairly testify that
4 here's the statement as I heard it, he stole guns and marijuana
5 from Harris, if that's in fact the statement, is the "from
6 Harris" itself integral to the "stole guns and marijuana"? Is
7 it necessary to parse the statement so fine? Does the
8 statement become incomplete or misleading in any way to excise
9 it if a witness would fairly testify this is what he said and I
10 remember it because it was, you know, that was part of what I
11 remember from the statement? There must be cases precisely on
12 point that talk about whether the statement has to be edited
13 before a witness testifies to it.

14 MR. ADAMS: Thank you, your Honor. We'll certainly
15 brief that.

16 I will say that in the cases that I've looked at, they
17 are not parsed nearly so finely. In Katsougrakis in particular
18 the statements include things like the person who made the
19 statement said that he and another person were to be paid
20 \$3,000 for torching a diner. That statement in its entirety
21 was admissible. But obviously the fact that I torched a diner
22 alone or with somebody else, both of those would be against my
23 penal interest. The Court didn't parse it nearly so finely.

24 And then finally with respect to the indicia of
25 reliability, in this case I get the sense that the defense is

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1 trying to have it both ways. Both the fact that this is a
2 marital communication speaks to its reliability. That's one of
3 the reasons why a privilege would exist were Mr. Nicholson on
4 trial; the privilege exists to foster that reliability and
5 confidence. But apart from the internal reliability of the
6 statement, what the government has and will proffer is
7 co-conspirator statements offered through different witnesses,
8 in this case statements by the shooter as well as statements by
9 Mr. Haris himself, that corroborate the fact that the motive
10 for this murder was Mr. Haris' theft from -- I'm sorry,
11 Mr. Nicholson's theft from Mr. Haris.

12 So those external factors along with the internal
13 factors and the statement itself we think support the
14 reliability in this case.

15 THE COURT: OK.

16 MR. ADAMS: Your Honor, would you -- is there a
17 particular date by which you would like briefing?

18 THE COURT: Well, when can you reasonably have it?
19 Thursday?

20 MR. ADAMS: Yes, sir. Not a problem.

21 THE COURT: Do you want to be heard on this,
22 Ms. Sternheim?

23 MS. STERNHEIM: Your Honor, if the Court would commit,
24 I'd like to review what the government is going to submit. It
25 may impact the response that I give.

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1 THE COURT: Sure.

2 MS. STERNHEIM: My silence at this moment is in no way
3 an agreement.

4 THE COURT: Sure.

5 MS. STERNHEIM: But I will also do some further
6 research into this.

7 THE COURT: OK. If you could send me something by
8 Friday, that would be helpful, after you've seen what the
9 government does on Thursday.

10 MS. STERNHEIM: Your Honor, I am --

11 THE COURT: Monday?

12 MS. STERNHEIM: I am -- if I could just? I'm
13 attending the annual CJA conference and then will be in a
14 facility in Texas on Monday. May I just have until early
15 Tuesday morning?

16 THE COURT: Sure. Tuesday.

17 OK. Then we have the prior bad acts of -- alleged
18 prior bad acts of CW-1, -2 and -3.

19 The government makes a powerful argument, based on the
20 cases, that the kind of misconduct alleged with respect to
21 CW-1, -2 and -3 is the kind of conduct that courts have said
22 should not be admitted under Federal Rule of Evidence 608 as
23 impeachment. The defense responds that these are acts of
24 violence, but doesn't point to any cases, and it's not clear
25 that just because something is an act of violence it goes to

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1 credibility under Rule 608. The parties -- ultimately, the
2 defense says why don't you wait until we see the 3500 material
3 and we can make further arguments.

4 OK. We can address it again at the final pretrial
5 conference after the defense has had an opportunity to review
6 the 3500 material, and in the subsequent submissions the
7 parties are welcome to address these issues. But the defense
8 gives me no cases to suggest that this kind of information
9 should not be excluded from possible cross-examination. It's
10 also, one would think, unlikely that the 3500 material would
11 not disclose for cooperating witnesses far more relevant prior
12 acts that would be the basis of cross-examination.

13 As I read the submissions on CW-1, CW-2 and CW-3,
14 these are not past bad acts for which -- and the parties can
15 correct me if I'm wrong -- these witnesses would be subject to
16 prosecution today so that as a result of their cooperation
17 agreement they're getting something for their testimony. There
18 were prior convictions of CW-1 and CW-2. And as to CW-3 the
19 events occurred in 2005 and charges were dropped. So it
20 wouldn't appear that as a result of their cooperation agreement
21 CW-1, -2 or -3 are getting anything with respect to these
22 events. So the only basis for cross-examination is that the
23 events themselves reflect on credibility, and the defense
24 suggests no cases that support that proposition.

25 The parties have briefed this as only a 608 issue.

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1 It's also a 609 issue, isn't it, because there were convictions
2 of CW-1 and CW-2 for harassment and for CW-2 criminal contempt
3 and aggravated harassment? And under 609, those convictions
4 must be admitted if the elements require establishing a
5 dishonest act or false statement. But there is nothing about
6 these convictions that suggest that that's correct. So under
7 either 608 or 609 it wouldn't appear to be that these incidents
8 are properly subject to cross-examination.

9 But of course I'll await the further argument and the
10 production of the 3500 material, and I should be able to rule
11 on these incidents at the final pretrial conference. So if
12 anyone wants to give me anything else on these incidents, you
13 are welcome to do so.

14 Anyone else want to be heard on CW-1, -2 and -3?

15 MR. ADAMS: Nothing to add, your Honor.

16 MS. STERNHEIM: No. Thank you.

17 THE COURT: OK. There is then the defense motion and
18 the government response. There are two parts to this. The
19 first is the prior dealings of the co-conspirators with the
20 defendant in connection with drugs and guns prior to 2012, the
21 date that the indictment lists as the start of the conspiracy.

22 I had one question. In the government's response, the
23 government focuses on prior dealings with respect to drugs but
24 not with respect to guns. Would there also be prior dealings
25 with the defendant with guns?

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1 MR. ADAMS: Your Honor, in the following respect.
2 What we expect the testimony to be that would take us before or
3 prior to 2012 generally is cooperating witnesses who are
4 familiar with Mr. Haris from the neighborhood. So they know of
5 him from an approximate date. I expect that that will
6 generally be around 2012. I think that some of the witnesses
7 may say they knew him slightly before that, or knew of him
8 before that, and that the entire time that they knew him they
9 knew him to be, at the very least, the sort of local marijuana
10 dealer, and as they got to know him, they knew him to be a more
11 prolific narcotics trafficker, and that throughout the time
12 they knew him he carried guns on him while he dealt drugs.

13 So there is not going to be any sort of precision with
14 respect to the dates here, but our position generally is what
15 they're describing is not some different or earlier conspiracy,
16 it is the same conspiracy that continued to exist during the
17 charged timeframe.

18 THE COURT: OK. I can go over it again, but it
19 certainly appears that that proffered testimony would fall
20 squarely within the cases that support the admissibility of
21 testimony concerning how co-conspirators came to know the
22 defendant and that such testimony would be proper direct
23 evidence of the conspiracy itself. "Where the indictment
24 contains a conspiracy charge, uncharged acts may be admissible
25 as direct evidence of the conspiracy itself." United States v.

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1 Diaz, 176 F.3d 5279 (2d Cir. 1999).

2 "It is within the trial court's discretion to admit
3 evidence of prior acts to inform the jury of the background of
4 the conspiracy charged in order to help explain how the illegal
5 relationship between participants and the crime developed or to
6 explain mutual trust that existed between co-conspirators."

7 Diaz. Also, United States v. Rosa, 11 F.3d 315, 334 (2d Cir.
8 1993).

9 So, the proffered testimony at this point appears to
10 be admissible, and there is no reasonable 403 argument against
11 the admissibility of that testimony. It's relevant. It's not
12 unduly prejudicial. It's not unfairly prejudicial. It is
13 similar to the evidence that would be admitted with respect to
14 the conspiracy itself. It's no more inflammatory than the
15 evidence of the conspiracy itself. So at this point I don't
16 see a reasonable objection to the admissibility of that
17 testimony.

18 The second issue, then, is the attempt to -- alleged
19 attempt to get Hood to kill Flea. And as to that I thought
20 that in the government's submission it would tell me how that
21 evidence would go in and why my suggestion of simply deferring
22 it until trial, where I could make a more reasonable
23 determination of the 403 issue, I thought that the government
24 was going to tell me something about the timing of the proposed
25 testimony, because it makes so much sense to defer that issue

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1 until, at the very least, the latter part of the government's
2 case.

3 If the government had some problem with that in terms
4 of where it fit into the witnesses whom the government intends
5 to call, I thought that the government would be explaining that
6 to me in their submission, because I thought the government
7 said they thought that my suggestion was in fact a reasonable
8 and prudent suggestion and if there was a problem with it, I
9 thought that the government would let me know.

10 MR. ADAMS: No, your Honor. I apologize. We did
11 think that the suggestion was reasonable and that we -- my
12 understanding, based on our discussion yesterday, was that we,
13 the government, would go forward on the understanding that
14 we'll put together a witness order that facilitates the Court's
15 ability to gauge the overall case.

16 THE COURT: Fine.

17 MR. ADAMS: So I apologize for not getting into it in
18 the letter.

19 THE COURT: Never necessary to apologize.

20 MR. ADAMS: I do anticipate -- I will say the way that
21 I expect that this to come in will be through -- if it comes in
22 will be through two particular cooperating witnesses. I
23 anticipate that it will not be efficient on our part to put
24 both of those witnesses at the back end of the trial. I expect
25 at least one of them would probably be an earlier witness in

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1 the trial, given sort of his overall knowledge of the
2 conspiracy is a good witness as sort of someone to paint the
3 whole picture. So with that in mind, we may well ask to recall
4 that witness at the end of the case, if need be, and if we have
5 permission to put in this evidence that we think is more proof
6 of the same conspiracy.

7 THE COURT: OK. In that connection, you should --
8 maybe you've done this already, but you should review Colon
9 because there is a long footnote in Colon which explains -- I
10 realize this is not being offered as 404(b) evidence, it's
11 being offered as direct evidence, but the footnote in Colon
12 explains that it's wise to defer 404(b) evidence until
13 rebuttal. And if the defense doesn't present a case, the
14 government can still reopen to present 404(b) evidence if the
15 Court makes the 404(b) and 403 analysis. And an instruction to
16 the jury is appropriate, the gist of which is under the rules
17 of evidence, this evidence could not have been admitted before
18 now in order to avoid any inference that the process was
19 somehow improper. And I just suggest to you it's helpful to
20 review the footnote.

21 MR. ADAMS: Thank you, your Honor.

22 And one other thing that I would note. We did brief
23 it as 403 for today's purposes. I think I mentioned yesterday
24 that depending on the defense tactics or arguments or line of
25 cross-examination, there may well be a 404(b) reason to offer

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1 the same, but for the moment we see it as just proof of the
2 charged conspiracy.

3 THE COURT: Direct evidence rather than 404(b)
4 evidence?

5 MR. ADAMS: Yes, sir, but with the reservation that I
6 can imagine particular lines of cross or argument that would
7 change our view on how it should be viewed.

8 THE COURT: OK. Well, then the answer on this issue
9 is clear at this point. The government should not refer in
10 openings or in the evidence to this incident, the alleged
11 attempt to get Hood to kill Flea, and shouldn't present any
12 evidence on that without raising the issue with the Court, at
13 which time the parties can argue out whether it's direct
14 evidence, whether it is 404(b) evidence at that point, and the
15 403 analysis.

16 MR. ADAMS: Thank you, your Honor.

17 THE COURT: Do you want to be heard on that,
18 Ms. Sternheim?

19 MS. STERNHEIM: Not at this moment. Thank you.

20 THE COURT: OK.

21 I think that completes the issues. Anything further?

22 MR. ADAMS: Nothing for the government.

23 MS. STERNHEIM: No. Thank you.

24 THE COURT: OK. See you all on Friday, the 17th.

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